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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

FERNANDO SALAZAR CERVANTES,

Defendant and Appellant.

2d Crim. No. B230928
(Super. Ct. No. 2009002893)
(Ventura County)

Fernando Salazar Cervantes appeals his conviction by jury of two counts of lewd act on a child (Pen Code, § 288, subd. (a))[1] and continual sexual abuse of a child under the age of 14 (§ 288.5, subd. (a)) with special findings that he committed the offenses against multiple victims (§ 667.67, subd. (b)(e)(5)). The trial court sentenced appellant to 60 years to life state prison. We affirm.

[1] All statutory references are to the Penal Code.

Facts

Appellant was convicted of molesting three nieces, Ja.H., Je.H., and T.H., and his daughter, E.C., based on the following evidence:

Ja.H. – Count 1; Continuous Sexual Abuse

Ja.H. (age 13) testified that appellant first touched her when she was four years old. When Ja.H. was six or seven, appellant grabbed her outer clothes and squeezed her butt while she was playing with her cousin T.H. On another occasion, Ja.H. was wearing a skirt and tried to look at a dog on the other side of a fence. Appellant picked her up and tried to put his fingers inside her underwear.

When Ja.H. was seven to ten years old, appellant touched her chest and butt. Appellant warned Ja.H. that she would get in trouble if she told her parents. On another occasion, appellant pushed Ja.H. down and touched her chest over her clothes. On a third occasion, appellant offered Ja.H. five dollars if she took off her clothes.

Je.H. – Count 2;Continuous Sexual Abuse

Je.H. (age 18) testified that appellant touched her breasts, vagina, and anus when she was five or six years old every time she visited. When Je.H. was seven or eight years old, appellant made her orally copulate him on ten occasions. If Je.H. resisted, appellant grabbed the back of her head and forced her to orally copulate him. On another occasion, appellant made Je.H. watch a pornographic movie.

On at least five occasions appellant placed his penis inside Je.H.'s vagina and anus or between her breasts. Appellant threatened to harm her family if she told anyone. On several other occasions, appellant used a knife to enter a locked bathroom while Je.H. was taking a shower.

After Je.H. was 12 years old, appellant stopped having sex with her but continued to rub her breasts and touch her vagina.

E.C. – Count 3;Lewd Conduct

E.C. (age 17) told a police officer that appellant touched her when she was young. In a taped phone call, E.C. told Je.H. that appellant used to take her into the

shower and lick her vagina when she was five or six years old. During the call, E.C. acknowledged that appellant touched and had sex with Je.H.

T.H. – Count 4; Lewd Conduct

T.H. (age 9) testified that appellant touched her vagina on the outside of her skirt when she was six years old. T.H. said "No, Padrino." Appellant apologized and withdrew his hand.

Appellant's Admissions

On January 18, 2009, Je.H. spoke to appellant in a police monitored phone call. During the call, appellant admitted making Je.H. orally copulate him.

On January 22, 2009, appellant waived his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694]) and admitted molesting Je.H. and T.H. Appellant stated that he had sex with Je.H. three times and made her orally copulate him once. Appellant admitted fondling T.H. on the outside of her clothes.

Substantial Evidence –T.H.

Appellant argues that the evidence does not support the finding that he touched T.H. with the intent to sexually arouse himself. (§ 288, subd. (a).) Section 288, subdivision (a) "prohibits *all* forms of sexually motivated contact with an underage child." (*People v. Martinez* (1995) 11 Cal.4th 434, 444.)

As in any sufficiency of the evidence appeal, we review the record in the light most favorable to the judgment and presume the existence of every fact the jury could reasonably deduce from the evidence in support of the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We are precluded from reweighing the evidence or reevaluating the credibility of the witnesses. (*Ibid.*) In the end, "it is the *jury*, not the appellate court, which must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] . . . If the circumstances reasonably justify the jury's findings, the reviewing court may not reverse the judgment merely because it believes that the circumstances might also support a contrary finding. [Citations.]" (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139.)

T.H. testified that appellant touched her in the garage. Appellant fondled her vagina by touching the outside of her skirt. T.H. knew the touching was inappropriate and said, "No, Padrino." Appellant apologized, removing his hand. T.H. felt "sad" because her mom had told her not to let anyone touch her private parts. T.H. later told her cousins (Ja.H. and Tanya) that appellant had touched her.

Appellant argues that it was not a lewd act because he was drunk and T.H. thought the touching was accidental. Intent may be inferred from " 'all the circumstances, including the charged act. . . .' " (*People v. Martinez*, *supra*, 11 Cal.4th at p. 445.) The trier of fact may consider "the defendant's extrajudicial statements [citation], other acts of lewd conduct admitted or charged in the case [citations], the relationship of the parties [citation], and any coercion, bribery, or deceit used to obtain the victim's cooperation or to avoid detection [citation]." (*Ibid.*)

Most of those factors are present here. The touching occurred at appellant's house while T.H.'s family was visiting. Although the touching was brief, it was similar to appellant's sexual abuse of Ja.H. who testified that appellant squeezed her butt over her clothes. On another occasion, appellant picked Ja.H. up and tried to put his fingers inside her skirt and underwear. Like T.H., appellant touched Ja.H. when she was five or six years old.

In a taped confession, appellant told Detective Albert Miramontez that he "fondled" T.H. Appellant admitted that he was sexually attracted to young girls and had sex with T.H.'s cousin, Je.H., on numerous occasions. Based on T.H.'s testimony, the molestation of Ja.H. and Je.H., the taped phone calls, and appellant's confession and pattern of conduct, the jury reasonably inferred that appellant touched T.H. with the intent to gratify his sexual desire. (*People v. Martinez*, *supra*, 11 Cal.4th at p. 445; *People v. Memro* (1995) 11 Cal.4th 786, 865.)

Appellant argues that the touching was brief, that the garage door was open, and that T.H.'s brother and sister were nearby, but those facts do not rule out sexual intent. Our sole function is to determine if, "viewing the evidence in the light

most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.]" (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 [61 L.Ed.2d 560, 573].) Substantial evidence supports the finding, consistent with due process, that appellant touched T.H. with the intent to obtain sexual gratification. (*Ibid.; People v. Johnson* (1980) 26 Cal.3d 557, 577-578.) Appellant was not denied due process of law.

CALCRIM 1110 and 1120

Appellant argues that the instructions on lewd act and continuous sexual abuse of a child (CALCRIM 1110 and 1120) were misleading because the jury was instructed that "the touching need not be done in a lewd or sexual manner." (*Ante* fn. 3.) Appellant forfeited the error by not objecting or requesting a clarifying instruction. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192; *People v. Guerra* (2006) 37 Cal.4th 1067, 1138.)

On the merits, there was no instructional error. In *People v. Sigala* (2011) 191 Cal.App.4th 695, 70l, our colleagues in Division Five recently held that CALCRIM 1110 and 1120 are accurate statements of the law and consistent with *People v. Martinez supra,* 11 Cal.4th at page 444, which states that "section 288 prohibits *all* forms of sexually motivated contact with an underage child. Indeed, the 'gist' of the offense has always been the defendant's intent to sexually exploit a child, not the nature of the offending act."

"As *Martinez* emphasizes, 'the cases have made clear that a "touching" of the victim is required, and that sexual gratification must be presently intended at the time such "touching" occurs. [Citations.] However, the form, manner, or nature of the offending act is not otherwise restricted. Conviction under the statute [i.e. section 288] has never depended upon contact with the bare skin or "private parts" of the defendant or the victim. [Citations.] Stated differently a lewd or lascivious act can occur through the victim's clothing and can involve "any part" of the victim's body. [Citations.]' " (*People v. Sigala, supra,* 191 Cal.App.4th at p. 700.)

We apply the same analysis and hold that CALCRIM 1110 and 1120, read in their entirely, are correct statements of the law.

Appellant argues that the trial court should have instructed that "the touching need not be done in a lewd or sexual manner *provided a lewd or sexual intent is otherwise manifested under the particular circumstances*." (Emphasis added.) The trial court had no sua sponte duty to give an amplifying instruction that was argumentative, misstated the law, or would confuse the jury. (*People v. Earp* (1999) 20 Cal.4th 826, 886-887; *People v. Wright* (1988) 45 Cal.3d 1126, 1135.) Appellant's proposed instruction is inconsistent with *People v. Martinez, supra*, 11 Cal.4th at page 449 which states that "no separate meaning can be ascribed to the literally distinct requirements of section 288, subdivision (a), that the act be done 'willfully and lewdly' and 'with [sexual] intent.' As commonly understood, both phrases overlap and refer to a single phenomenon – 'sexual motivation.' [Citation.]"

Appellant complains that two mental states – willful conduct and specific intent to sexually arouse - are mentioned in the same CALCRIM 1110 instruction.[2] The jury expressed no confusion or uncertainty about the instruction which was clarified in a CALCRIM 251 instruction that "[t]he crimes and allegations charged in this case require proof of the union, or joint operation, of act and wrongful intent. [¶] For you to find a person guilty of these crimes and allegations, that person must not only intentionally commit the prohibited act, but must do so with a specific intent. The act

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[2] The CALCRIM 1110 (Lewd or Lascivious Act: Child Under 14 Years) instruction stated in pertinent part: "The defendant is charged in Counts 3 and 4 with committing a lewd or lascivious act on a child under the age of 14 years in violation of Penal Code section 288(a). [¶] To prove the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant willfully touched any part of a child's body either on the bare skin or through the clothing; [¶] 2. The defendant committed the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child; [¶] AND [¶] 3. The child was under the age of 14 years at the time of the act. [¶] The touching need not be done in a lewd or sexual manner. [¶] Someone commits an act *willfully* when he or she does it willingly or on purpose."

and the specific intent required are explained in the instruction for that crime." The jury was also instructed: "The People must prove not only that the defendant did the acts charged, but also that he acted with a particular intent and mental state." (CALCRIM 225.) On review, it is presumed that the jury understood and followed the instructions. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.)

Assuming, arguendo that the instructions misstated an element of the offenses, the error was harmless beyond a reasonable doubt. (*Neder v. United States* (1999) 527 U.S. 1, 15 [144 L.Ed.2d. 35, 51]; *People v. Flood* (1998) 18 Cal.4th 470, 502-503.) Appellant admitted, in a taped confession, that he molested Je.H. and "fondled" T.H. ppellant's touching of Ja.H. and E.C. was unquestionably sexual. There is no evidence that the molestations were innocent touchings or committed without the intent of sexual gratification.

Lesser Included Instruction - Battery

Appellant argues that the trial court erred in not sua sponte instructing that misdemeanor battery (§ 242) is a lesser included offense to count 1 (continuous sexual abuse of a minor; Ja.H.) and count 4 (lewd conduct on a minor; T.H.). Appellant asserts that battery, like lewd act on a child, only requires a touching of the victim. (See *People v. Thomas* (2007) 146 Cal.App.4th 1278, 1292-1293.)

Instructions on a lesser included offense must be given when there is substantial evidence from which the jury could conclude the defendant is guilty of the lesser offense, but not the charged offense. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584; *People v. Breverman* (1998) 19 Cal.4th 142, 162.) "[D]ue process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction." (*Hopper v. Evans* (1982) 456 U.S. 605, 611 [72 L.Ed.2d 367, 373]; *People v. Halloway* (2004) 33 Cal.4th 96, 141 [same].)

Absent here is any evidence that the charged acts were committed for a nonsexually-motivated purpose. On count 1, it is uncontroverted that appellant touched Ja.H.'s butt, breasts and anus. On another occasion appellant picked Ja.H. up and tried

to put his fingers inside her underwear. No reasonable jury would have concluded that the touching was a simple battery. (*People v. Breverman, supra,* 19 Cal.4th at p. 162.)

With respect to count 4, appellant admitted fondling T.H. T.H. believed the touching was accidental, but a touching by accident or reckless conduct is not battery.[3] (*People v. Lara* (1996) 44 Cal.App.4th 102, 107-108; see CALCRIM 960 [defining misdemeanor battery as including "[t]he slightest touching . . . if it is done in a rude or angry way."].) An uncle who sexually gratifies himself by hugging or groping a niece while purportedly playing a harmless game is guilty of lewd conduct, not simple battery. (See *People v. Martinez, supra,* 11 Cal.4th at p. 450.)

Assuming, arguendo, that the trial court erred in not instructing on misdemeanor battery, the alleged error was harmless. A battery conviction would have required the jury to find that appellant had no sexual interest in touching the children. The jury, however, returned a true finding *on each count* that appellant committed two or more sex offenses against more than one victim. (§ 667.61, subd. (e)(5); CALCRIM 3181.)[4] " 'Error in failure to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions.' [Citation.]" (*People v. Chatman* (2006) 38 Cal.4th 344, 392.)

Appellant's remaining arguments have been considered and merit no further discussion.

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[3] Appellant defended on the theory that that the touching was accidental or for an "innocent purpose," i.e., to see if T.H. had wet her pants or her skirt and shorts."

[4] The jury received a CALCRIM 3181 instruction (Sex Offenses: Sentencing Factors – Multiple Victims (Pen. Code, § 667.61(e)(5)) that stated: "If you find defendant guilty of two or more sex offenses, as charged in the amended information, you must then decide whether the People have proved the additional allegation that those crimes were committed against more than one victim. [¶] The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that this allegation has not been proved."

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, Acting P.J.

We concur:

PERREN, J.

COFFEE, J.*

*Retired Associate Justice of the Court of Appeal, Second /Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Patricia M. Murphy, Judge

Superior Court County of Ventura

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